

DISTRICT COURT OF GUAM  
TERRITORY OF GUAM

ALAN SADHWANI *et al.*,

Civil Case No. 03-00036

Plaintiffs,

vs.

HONGKONG AND SHANGHAI BANKING  
CORPORATION, LTD., *et al.*,

Defendants.

ORDER

On February 13, 2004, this case came before the Court for hearing on a Motion to Dismiss filed by defendant Hongkong and Shanghai Banking Corp., Ltd. ("HSBC"). Present at the hearing were Attorneys Anita P. Arriola and Joaquin C. Arriola for the Plaintiffs. Attorney Jacques A. Bronze appeared on behalf of HSBC. At the conclusion of the hearing, the Court took the motion under advisement. The Court now issues this written Order setting forth the bases for its rulings herein.

**FACTS**

The Complaint raises six separate causes of action which arise out of a long relationship between the parties. The Plaintiffs have been customers of HSBC for approximately 25 years. Complaint at ¶5. The Plaintiffs first went into business as Tick Tock, in 1978. *Id.* Mr. Sadhwani met the then manager of HSBC in 1978 and has since banked exclusively with HSBC (with the exception for credit card deposits to Citibank because HSBC, a foreign corporation, did not accept credit card deposits from merchants). *Id.* The Plaintiffs assert that all of their deposits and borrowings were with HSBC exclusively. *Id.* Over the 25 years, the Plaintiffs have

ORIGINAL

1 deposited about \$100 million with HSBC. Id. The Plaintiffs also socialized with the bank  
2 managers (who changed every 3 years) at Mr. Sadhwani's home, at the home of the bank  
3 managers, or in restaurants. Id. By virtue of this long-standing relationship, the Plaintiffs assert  
4 that they placed explicit faith, trust, and confidence in HSBC, trusting that the bank and its  
5 officers/employees would deal with them in a fair and honest manner. Id.

6 In September 2002, the Plaintiffs had an outstanding loan balance of over \$6.8 million  
7 with HSBC (the "Loan"). When HSBC determined it would discontinue its operations in Guam,  
8 it "placed pressure" on the Plaintiffs to pay off the Loan.<sup>1</sup> Thus, on March 5, 2003, the parties  
9 entered into a Promissory Note Modification Agreement (see Exhibit C to Complaint), which  
10 extended the maturity date of the Note to August 31, 2003.

11 Prior to March 5, 2003, however, the parties met on February 13, 2003. HSBC sent a  
12 letter to Mr. Sadhwani on February 17, 2003 (see Exhibit B to Complaint). This letter purports  
13 to memorialize the February 13, 2003 meeting wherein the parties discussed, among other things,  
14 extending the maturity date of the Note to the end of August 2003 and Mr. Sadhwani's listing of  
15 certain securing real estate properties with Century 21.

16 Following the execution of the Promissory Note Modification Agreement, on  
17 March 6, 2003, HSBC sent a letter to Mr. Sadhwani (see Exhibit D to Complaint). The letter  
18 reiterated the parties' discussions on March 5, 2003. The letter indicates that Mr. Sadhwani had  
19 agreed to provide HSBC with a written plan by March 12, 2003. Said written plan would explain  
20 how Mr. Sadhwani would repay the Note by the due date. Additionally, the letter stated that  
21 HSBC was "prepared, without in any way committing itself at this stage, to consider a discount  
22 on the loan balance if [Mr. Sadhwani] elect[ed] to give the secured properties to [HSBC]. This  
23 'friendly foreclosure' method would transfer the burden of property liquidation to [HSBC] and  
24 minimise (sic) legal fees for both parties." Exhibit D to Complaint at ¶3. HSBC went on to state  
25 that if Mr. Sadhwani wished "to explore this approach," he should assign a value to the property  
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27 <sup>1</sup> HSBC's decision to discontinue its operations in Guam appears to be the propelling event  
28 in this lawsuit.

1 a submit a written proposal for HSBC's consideration. Id.

2 On March 13, 2003, HSBC again wrote to Mr. Sadhwani. See Exhibit E to Complaint.  
3 The letter stated that Mr. Sadhwani had failed to provide the written plan by March 12, 2003 as  
4 agreed upon. HSBC stated that it would need the written plan by that day (March 13, 2003) so  
5 that it could "understand how [Mr. Sadhwani] intend[s] on repaying the loan by the revised  
6 maturity date." Id. The bank also urged Mr. Sadhwani to "consider [its] recommended approach  
7 under 'friendly foreclosure.'" Id.

8 On March 14, 2003, Mr. Sadhwani wrote to HSBC. See Exhibit F to Complaint. Mr.  
9 Sadhwani stated that he was "working with a bank to pay off [the] outstanding loan with  
10 [HSBC]." Id. Mr. Sadhwani requested more information about the "friendly foreclosure" since  
11 he did not understand what exactly HSBC wanted. Id. Mr. Sadhwani also asked HSBC to  
12 explain the "discounting" and how that would happen. Id.

13 On March 21, 2003, HSBC once again wrote to Mr. Sadhwani. See Exhibit G to  
14 Complaint. This letter (which the Plaintiffs refer to as the "work out agreement" in the  
15 Complaint and in its Opposition Brief) detailed several options which HSBC gave to the  
16 Plaintiffs. See id. The first option was that Mr. Sadhwani could continue to list his properties  
17 with Century 21. If he was able to sell the property at market price and had the listing  
18 agreements, the Bank "may consider tolling collection efforts pending the closing in escrow of  
19 written accepted purchase offers with net proceeds paid to [HSBC]." Id. In the event he was  
20 unable to sell the properties through Century 21, Mr. Sadhwani's second option was that HSBC  
21 "may consider accepting deeds in lieu of foreclosure at negotiated values." Id. Finally, Mr.  
22 Sadhwani could avoid the entire process if he were "seriously making an effort to refinance [the]  
23 loan facility." Id. If Mr. Sadhwani was proceeding via this route, HSBC requested "immediate  
24 confirmation of your loan application and efforts to obtaining refinancing." Id. HSBC stated  
25 that it was "ready, able and willing to assist [Mr. Sadhwani's] negotiation of replacement  
26 financing." Id. In conclusion, HSBC requested Mr. Sadhwani to respond to the letter with the  
27 required information by April 4, 2003.

28 In reliance upon this "work out agreement," the Plaintiffs assert that they took all

1 necessary steps to either sell their properties or try to obtain alternate financing. On  
2 April 3, 2003, Century 21 provided Mr. Sadhwani with a letter detailing its efforts to market the  
3 Plaintiffs' properties. See Exhibit H to Complaint. Additionally, Mr. Sadhwani wrote to HSBC  
4 on April 4, 2003, informing it that he tried to get the refinancing but had not yet received a  
5 confirmation of the loan. See Exhibit J to Complaint. Also, Mr. Sadhwani stated that he was  
6 still trying to sell the properties but that if he was unsuccessful, he would hand them over to  
7 HSBC. Mr. Sadhwani pleaded for "sometime" since he was working to satisfy the outstanding  
8 loan. Id.

9 On July 18, 2003, the Plaintiffs received from HSBC a "Notice of Intent to Sell Loan"  
10 (dated July 15, 2003). See Exhibit K to Complaint.

11 On July 22, 2003, Mr. Underwood, the Guam Manager of HSBC, met with Mr. Sadhwani  
12 at Mr. Sadhwani's office. See Complaint at ¶ 17. Mr. Sadhwani pleaded with Mr. Underwood  
13 not to sell the Loan and offered him \$3 million to settle the Loan. Mr. Underwood stated that  
14 HSBC would not accept that amount. Thus, Mr. Sadhwani asked whether \$3.5 million would be  
15 sufficient. Mr. Underwood stated "Get me the money or guarantee, and I will try to stop the  
16 sale." Id.

17 On July 31, 2003, Mr. Sadhwani wrote to Mr. Underwood and detailed his attempts to  
18 settle the Loan. See Exhibit L to Complaint. Thereafter, Messrs. Sadhwani and Underwood met  
19 again, and Mr. Underwood assured Mr. Sadhwani that if he received the offer (*i.e.*, money or  
20 bank letter) by August 8, 2003, Mr. Underwood would "see what [he could] do." Complaint  
21 at ¶ 18.

22 On August 5, 2003, Mr. Sadhwani sent HSBC a copy of a letter from First Hawaiian  
23 Bank See Exhibit M to Complaint. The letter was an "indication of the terms and conditions"  
24 for financing a loan to the Plaintiffs to pay off the HSBC Loan. Id. The letter explicitly stated  
25 that it should "not be construed as a commitment on the part of [First Hawaiian Bank], and is  
26 only provided for indication purposes only." Id.

27 On August 11, 2003, HSBC sent Mr. Sadhwani a letter informing him that as of  
28 August 11, 2003, the Loan was sold to Paradise Marine Corporation. See Exhibit O to

Complaint.

Thereafter, the Plaintiffs brought suit against HSBC and Doe defendants in the Superior Court of Guam asserting six (6) separate causes of action. HSBC removed the action to this Court based on diversity jurisdiction. Shortly thereafter, HSBC brought the present Motion to Dismiss. The Plaintiffs filed an Opposition Brief, and HSBC filed a Reply Brief. Because separate grounds are raised to dismiss the various causes of action, the Court will address each one in turn.

### ANALYSIS

#### Standard for Motions to Dismiss

As noted by the Plaintiffs, a motion to dismiss for failure to state a claim is viewed with disfavor and is rarely granted. Gilligan v. Jamco Dev. Corp., 108 F.3d 246, 249 (9<sup>th</sup> Cir. 1997) (citing Hall v. City of Santa Barbara, 833 F.2d 1270, 1274) (9<sup>th</sup> Cir. 1986), *cert. denied*, 485 U.S. 940, 108 S. Ct. 1120 (1988)(overruled on other grounds)). This is because courts prefer to rule on the merits of a case rather than dismiss on the pleadings. Cabo Distrib. Co., Inv. v. Brady, 821 F. Supp. 601, 608 (N.D. Cal. 1992). Thus, “a complaint should not be dismissed . . . unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.” Conley v. Gibson, 355 U.S. 41, 45-46, 78 S. Ct. 99, 102 (1957). All allegations of material fact must be taken as true and construed in the light most favorable to the plaintiff. Desaigoudar v. Meyercord, 223 F.3d 1020, 1021 (9<sup>th</sup> Cir. 2000), *cert. denied*, 532 U.S. 1021, 121 S. Ct. 1962 (2001). The Court’s role at this stage of the proceedings is not to evaluate the strengths or weaknesses of the claims. See Scheuer v. Rhodes, 416 U.S. 232, 236, 94 S. Ct. 1683, 1686 (1974) (In evaluating a Rule 12(b)(6) motion to dismiss “[t]he issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims. Indeed, it may appear on the face of the pleadings that a recovery is very remote and unlikely but that is not the test.”)(overruled on other grounds). With this standard in mind, the Court now turns to the arguments raised in support of the dismissal of each cause of action.

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1           1<sup>st</sup> Cause of Action – Breach of Covenant of Good Faith & Fair Dealing

2           The first count of the Complaint alleges that HSBC acted in bad faith and failed to deal  
3 fairly with the Plaintiffs when it refused to agree to a commercially reasonable workout and  
4 refused to accept the alternative financing obtained by the Plaintiffs. See Complaint at ¶29.

5           HSBC argues that this cause of action should be dismissed for two reasons. First, HSBC  
6 contends that such a cause of action is not recognized by Guam law outside of insurance actions.  
7 In the alternative, HSBC argues that even if the cause of action was legally cognizable, the  
8 Plaintiffs fail to allege facts to support such a claim.

9           As to HSBC's first argument, it is important to note that under the *Erie Doctrine*, in  
10 diversity cases, the federal court must apply state substantive law. Erie R. Co. v. Tompkins, 304  
11 U.S. 64, 58 S. Ct. 817 (1938). The parties agree on this point. Thus, the focus is on whether  
12 Guam law would permit such an action in tort.

13           Most bad faith claims stemming from a contractual relationship arise in the insurer-  
14 insured context, and HSBC's motion cites to a plethora of these cases. HSBC's motion also  
15 notes that many courts have refused to recognize a bad faith action when a duty is breached in  
16 commercial contract cases outside of the insurance arena, holding instead that the aggrieved party  
17 merely has a breach of contract claim. HSBC contends that this is "an issue of first impression in  
18 Guam courts," and thus this Court must use "its own best judgment" in predicting how the Guam  
19 Supreme Court would rule on the matter. Motion at 1-2. However, as the Plaintiffs point out,  
20 while the Guam Supreme Court has not ruled on the issue, a Superior Court of Guam judge has  
21 held that such a cause of action is cognizable under Guam law. See Ada's Inc., et al. v. First  
22 Hawaiian Bank, et al., Superior Court of Guam Civil Case No. CV0785-02, Decision and Order  
23 (July 7, 2003) (authored by Judge Joaquin V.E. Manibusan, Jr.), attached as Exhibit 1 to  
24 Plaintiffs' Opposition Brief. The Plaintiffs urge the Court to follow the reasoning established in  
25 Ada by Judge Manibusan. Because a Guam court has ruled on the matter, the Plaintiffs assert  
26 that all the other cases cited to by HSBC are irrelevant since the Court must apply Guam  
27 substantive law.

28           The facts of Ada are similar to those in the present case. There, the plaintiffs were



1 customers of First Hawaiian Bank ("FHB"). The plaintiffs sought damages for breach of the  
2 covenant of good faith and for breach of contract. FHB moved to dismiss and argued that when a  
3 duty in a commercial contract is breached, the resulting claim is merely one for breach of  
4 contract and no tort damages are available. The Ada decision, however, noted that

5 [t]he concept of a bad faith action within the context of a breach of a commercial  
6 contract in the banking area is relatively new and changing. Courts are beginning  
7 to see that such actions are plausible in the context of certain pleadings. Some see  
8 no difference between the problem of a bank customer and that of an insured.  
9 Ada at 9.

10 The Ada decision analyzed a variety of cases on the issue and held that

11 when a customer complains of a breach by a bank of a commercial contract a  
12 breach of contract action should be an appropriate remedy. **However, a bad faith  
13 action commenced by a customer should not be dismissed simply because  
14 there is an available remedy under a breach of contract claim or merely  
15 because of the filing of the breach of contract claim.** It is after all the general  
16 rule of law that a bank is required to adhere to an implied duty of good faith and  
17 fair dealing toward its customers. A bank's failure to adhere to this implied duty  
18 should not bar a bad faith action merely because there is a remedy in a breach of  
19 contract action. Furthermore, the fact that there is such a duty on banks with  
20 regards to their relationships with their customers indicate[s that a bad faith  
21 action] . . . is authorized under the law when facts alleging such bad faith are  
22 plead. **Plaintiffs must allege some act of dishonesty by the bank and allege  
23 that the bank acted outside accepted commercial practices. When Plaintiffs  
24 do make such allegations, an appropriate cause of action is raised by the  
25 Plaintiff.** Id. at 11 (emphasis added).

26 The Court finds Judge Manibusan's decision to be well reasoned. Based on this decision,  
27 it appears that in the banking arena, Guam law would recognize a cause of action for breach of  
28 bad faith arising from a breach of a commercial contract between a customer and a bank.  
29 Nevertheless, HSBC urges the Court to ignore this local case on the basis that the Ada decision  
30 relied on the case of Seamen's Direct Buying Service, Inc. v. Standard Oil Co., 206 Cal.  
31 Rptr. 354 (1984), yet the Seamen's case and its progeny were overruled by the California  
32 Supreme Court decision in Freeman & Mills Inc. v. Belcher Oil Co., 44 Cal. Rptr.2d 420 (1995).  
33 This argument is unconvincing. The Freeman case was decided in 1995. The Ada decision was  
34 issued in July 2003. It would be reasonable to presume that Judge Manibusan was aware that  
35 Freeman overruled the Seamen's case, yet, because California caselaw is merely persuasive and  
36 not controlling, chose to follow the reasoning in Seamen's.

1           Additionally, it is important to note that neither the Seaman's or Freeman case involved  
2 the breach of a commercial contract between a bank and a customer. Rather, the Seaman's case  
3 involved a would-be dealer and an oil company, while the Freeman case concerned a contract  
4 between an accounting firm and an oil company.

5           While the Freeman case overruled the Seamen's decision, the California Supreme Court  
6 did so "in favor of a general rule precluding tort recovery for noninsurance contract breach, *at*  
7 *least in the absence of violation of 'an independent duty arising from principles of tort law'* other  
8 than the bad faith denial of the existence of, or liability under, the breached contract." Freeman,  
9 900 F.2f at 679-80 (internal citation omitted) (emphasis added). The California Supreme Court  
10 affirmed the finding of the Court of Appeal majority that no "special relationship" between the  
11 parties existed to justify a tort theory of recovery. *Id.* at 671. Thus, the Ada decision does not  
12 conflict with the Freeman holding as Judge Manibusan found the existence of a "special  
13 relationship" in that banks have an implied duty of duty of good faith and fair dealing toward its  
14 customers. Similarly, in this case the Complaint does allege sufficient facts to support a finding  
15 that a "special relationship" existed between the Plaintiffs and HSBC.

16           The Court is bound by substantive local law on this issue. Although there is no definitive  
17 ruling by the Guam Supreme Court, the Court has before it a valid and well-reasoned decision by  
18 the Superior Court of Guam. The Court cannot and will not simply ignore this local decision  
19 which recognizes a cause of action available to plaintiffs under Guam law. Accordingly, the  
20 Court rejects HSBC's contention that the first cause of action should be dismissed as a matter of  
21 law.

22           As for its second argument, HSBC maintains that the Plaintiffs' allegations are  
23 insufficient to support such a claim. The Court notes it must assume that all facts in the  
24 Complaint are true and must draw all reasonable inferences in the Plaintiffs' favor. The Court  
25 does not have the option, at this stage, of evaluating the strengths and weaknesses of the claims.  
26 Based on this standard, the Complaint sufficiently alleges facts that HSBC acted dishonestly and  
27 that it acted outside accepted commercial practices. Accordingly, the motion to dismiss the First  
28 cause of action must be denied.



1           2<sup>nd</sup> Cause of Action – Intentional Misrepresentation

2           The Plaintiffs' Second cause of action asserts that HSBC intentionally misrepresented  
3 that it was interested in pursuing a commercially reasonable work out, when it had no desire or  
4 intention to work out the Loan. See Complaint at ¶36.

5           HSBC raises two arguments why this cause of action should be dismissed. First, HSBC  
6 argues that because the Plaintiffs themselves failed to comply with the work out agreement by  
7 failing to obtain the alternative financing (a condition precedent), it should not be held  
8 responsible under the work out agreement. HSBC, however, fails to cite any authority for this  
9 proposition. The Plaintiffs should not be barred from alleging a claim against HSBC for  
10 intentional misrepresentation just because they were only able to obtain an indication letter  
11 and not a commitment letter. The indication letter does show action by the Plaintiffs in  
12 accordance with the work out agreement.

13           HSBC's second argument is that its actions (or alleged misrepresentations) could not give  
14 rise to this cause of action because they were "mere promises of future conduct." Motion  
15 at 12-14. HSBC, however, misses the whole point behind the Plaintiffs' allegations. The  
16 Plaintiffs do not allege that HSBC promised to take action in the future but failed to do so.  
17 Rather, the Complaint alleges that HSBC made specific representations to the Plaintiffs knowing  
18 full well that it had no intention of performing. Specifically, the Complaint alleges that HSBC  
19 represented to the Plaintiffs that it would accept sales of the securing real properties and/or  
20 alternate financing when in fact HSBC was in the process of selling the Loan, yet it continued to  
21 let the Plaintiffs believe such representations even after the Loan was sold. Based on these  
22 allegations, the Complaint sufficiently establishes a claim for intentional misrepresentation.  
23 Thus, HSBC's motion to dismiss the Second cause of action must also be denied.

24           3<sup>rd</sup> Cause of Action – Breach of Contract: Promissory Note Modification Agreement

25           The Third cause of action asserts that HSBC breached the March 5, 2003 Promissory  
26 Note Modification Agreement entered into by the parties. Specifically, HSBC breached said  
27 agreement by (1) failing to review the Note every 6 months, see Complaint at ¶41, and (2) selling  
28 the Loan to Paradise Marine Corporation, see Complaint at ¶ 42.

HSBC contends that the allegations supporting this cause of action fail to state a claim against HSBC upon which relief may be granted. Specifically, HSBC maintains that under Guam law, a promissory note which evidences a loan is a negotiable instrument. 13 GUAM CODE ANN. § 3104. Additionally, under Guam law a right arising out of an obligation is the property of the person to whom it is due and may be freely transferred. 18 GUAM CODE ANN. § 81102. There is nothing in the March 5, 2003 Promissory Note Modification Agreement which prohibits a transfer, sale, or assignment of the Note. Thus, HSBC asserts that selling the Loan to Paradise Marine Corporation ("PMC") could not form the basis for a breach of contract action.

The Plaintiffs do not discuss this issue in detail in their Opposition Brief. The Plaintiffs do state "when HSBC sold the Loan to PMC, HSBC breached the Loan agreement, **as amended by the workout agreement.**" Plaintiffs' Opposition Brief at 11 (emphasis added). As HSBC notes, the Plaintiffs are confined by the actual words of the Complaint, and, unfortunately, the Third cause of action does not make any reference to the purported "work out agreement."

Additionally, HSBC states that the Plaintiffs' argument that HSBC somehow breached the Promissory Note Modification Agreement by not reviewing the Loan every six months is without merit. The Promissory Note Modification Agreement was entered on March 5, 2003, yet the maturity date of the Note was set at August 31, 2003. The maturity date was less than 6 months away. Thus, what benefit is there to a review of the Note after the Note was supposed to be paid in full.

HSBC's motion to dismiss as to the Third cause of action is hereby granted. Even viewing the facts in a light most favorable to the Plaintiffs, the Complaint fails to state a claim against HSBC upon which relief may be granted. However, this failure may be cured by amendment. Thus, dismissal of this cause of action is without prejudice.

4<sup>th</sup> Cause of Action – Breach of Contract: Work Out Agreement

The Plaintiffs' Fourth cause of action asserts that HSBC breached the work out agreement (Exhibit G to Complaint). Specifically, ¶46 of the Complaint states that

[HSBC] failed to assist Plaintiffs' negotiations for replacement financing; refused to accept the replacement financing as detailed in the terms and conditions for alternative financing from [FHB]; failed to give a "hairline discount" on the Loan

1 when Plaintiffs obtained the terms and conditions for alternative financing from  
2 [FHB]; and sold the Loan to [PMC] instead of complying with the parties' work  
out agreement. All of these acts constitute breaches of the work out agreement.

3 HSBC asserts that dismissal of this cause of action is warranted. HSBC contends that  
4 since the Plaintiffs failed to fulfill the express conditions precedent contained in the alleged work  
5 out agreement, this failure terminates HSBC's reciprocal obligation to perform under the said  
6 agreement. A similar argument was raised by HSBC in an attempt to dismiss the Second cause  
7 of action, but rejected by the Court. Likewise, the Court rejects the argument as it pertains to the  
8 Fourth cause of action. Moreover, as the Plaintiffs assert, the requirements of actually selling the  
9 properties and obtaining a commitment letter for alternate financing cannot be construed as  
10 "conditions precedent" since the work out agreement does not specify a time limitation for  
11 Plaintiffs to provide evidence of such efforts. Thus, only a reasonable length of time for  
12 performance is required. The Plaintiffs contend that HSBC did not give the Plaintiffs a  
13 reasonable period of time to obtain the alternate financing or close sales on the properties.

14 Unlike the Third cause of action which failed to sufficiently state a cause of action against  
15 HSBC, in this case, construing the facts contained in the Complaint as true and resolving all  
16 reasonable inferences in favor of the Plaintiffs, the Court finds that the Complaint sufficiently  
17 alleges a cause of action for breach of the work out agreement. Accordingly, HSBC's motion as  
18 to the Fourth cause of action is hereby denied.

19 5<sup>th</sup> Cause of Action – Breach of Fiduciary Duty

20 The Fifth cause of action asserts a breach of fiduciary duty claim against HSBC. The  
21 Complaint describes the fiduciary relationship as follows:

22 [b]ecause of the longstanding, close and confidential relationship between  
23 [HSBC] and Plaintiffs, and by virtue of the trust and confidence which [HSBC]  
24 encouraged Plaintiffs to place in [it] and which the Plaintiffs did place in [HSBC],  
as well as the assurances that [HSBC] gave Plaintiffs that it would agree to a  
commercially reasonable work out, [HSBC] owed to Plaintiffs a duty of fiduciary  
care. Complaint at ¶49.

25  
26 Specifically, the Complaint asserts specific acts by HSBC which resulted in the breach of  
27 this fiduciary duty:

28 A. By disclosing confidential information, including but not limited to, account

1 and deposit information, loan payment history, and other banking transactions  
2 between Plaintiffs and [HSBC], to [PMC], a non-bank and purchaser of Plaintiffs'  
3 Loan with [HSBC];  
4 B. By failing to assist Plaintiffs' negotiations for replacement financing, as  
5 [HSBC] had represented;  
6 C. By refusing to accept the replacement financing as detailed in the terms and  
7 conditions for such financing from FHB and as required by the parties' work out  
8 agreement;  
9 D. By failing to give a "hairline discount" on Plaintiffs' Loan when Plaintiffs  
10 obtained the terms and conditions for alternative financing from [FHB];  
11 E. By selling the Loan to [PMC], a Guam corporation that is not licensed to  
12 conduct banking and has never conducted banking business in Guam.  
13 Complaint at ¶50.

14 HSBC acknowledges that under certain special circumstances, a lender may be found to  
15 have a fiduciary relationship with a borrower. However, HSBC maintains that in this case, the  
16 Fifth cause of action should be dismissed because the Complaint is devoid of any facts  
17 delineating how the relationship of trust and confidence arose or any other special circumstances  
18 that would establish a fiduciary relationship.

19 Again, the Court cannot evaluate the strengths and weaknesses of the claims. Rather, the  
20 Court must accept as true the facts alleged in the Complaint, and it must also draw all reasonable  
21 inferences in favor of the Plaintiffs. Based on this standard and the facts alleged, the Complaint  
22 sufficiently states a cause of action for breach of fiduciary duty. Accordingly, HSBC's attempts  
23 to dismiss the Fifth cause of action is denied.

24 6<sup>th</sup> Cause of Action – Breach of Banking and Confidentiality Laws

25 The Sixth and final cause of action alleged in the Complaint is that

26 [a]bsent the consent of the plaintiffs, [HSBC] expressly or impliedly agreed that it  
27 . . . [would] not divulge to third persons the terms or the state of Plaintiffs'  
28 accounts with [HSBC], any of their transactions with [HSBC], or any other  
information about the Plaintiffs acquired by [HSBC] through the 25 years of their  
banking relationship. The negotiation, sale, assignment, and transfer of Plaintiffs'  
Loan to [Paradise Marine Corporation] constitutes a breach of banking and  
confidentiality laws by [HSBC]." Complaint at ¶57.

29 HSBC complains that this cause of action must be dismissed because it (1) has no legal  
30 basis and (2) fails to allege any damages from the alleged breach. HSBC asserts that the  
31 Complaint does not cite to any law – federal or local – which would forbid it from assigning its  
32 rights under the Note to a third party. Additionally, the Complaint fails to allege any damages

1 which resulted from the purported breach, and without damages Plaintiffs have no cause of  
2 action.

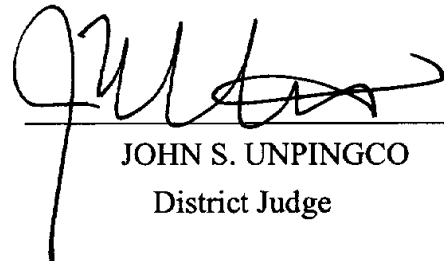
3 As to the first argument, HSBC is correct. Although the Federal Rules of Civil Procedure  
4 permit liberal "notice pleading" and do not require specificity with regard to the correct legal  
5 theory or statute, see Fed. R. Civ. P. 8(a), the complaint must contain sufficient notice to permit  
6 HSBC to prepare a defense. Here, the Complaint merely alleges a breach of "banking and  
7 confidentiality laws." The banking industry is a highly regulated one. There are a myriad of  
8 federal and local laws with which banks must comply. It is unreasonable to expect HSBC to sort  
9 through all banking laws and regulations to determine which one (or ones) it allegedly violated.

10 Additionally, the Plaintiffs have failed to allege how they have been injured or damaged  
11 by this alleged "breach of banking and confidentiality laws." Thus, the Court must dismiss this  
12 cause of action, however, such dismissal is without prejudice. The Plaintiffs are permitted to  
13 amend their Complaint to re-assert this cause of action and to specify what law(s) HSBC  
14 allegedly violated.

15 **CONCLUSION**


16 The Court hereby DENIES the Motion to Dismiss as to the First, Second, Fourth, and  
17 Fifth Causes of Action. Additionally, the Court GRANTS the Motion to Dismiss as to the Third  
18 and Sixth Causes of Action, which are dismissed without prejudice. The Plaintiffs are hereby  
19 permitted to amend their Complaint to re-assert the dismissed causes of action.

20 SO ORDERED this 9th day of April, 2004.

21  
22   
23 JOHN S. UNPINGCO  
24 District Judge

24 Notice is hereby given that this document was  
25 entered on the docket on APR 12 2004.  
26 No separate notice of entry on the docket will  
27 be issued by this Court.

26 Mary L. M. Moran  
27 Clerk, District Court of Guam

28 By:  APR 12 2004  
Deputy Clerk Date